Supreme Court, U.S.
FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

SHERMAN NOBLE PETITIONER

VS.

LARRY NORRIS, DIRECTOR RESPONDENT
THE ARKANSAS
DEPARTMENT OF CORRECTIONS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BY: SHERMAN NOBLE
Inmate No. 100015
P.O. Box 240
Tucker, AR 72168
Pro Se, Petitioner

QUESTIONS PRESENTED

I. Whether the Sixth Amendment to the United States Constitution protects individuals on the State level of the judiciary system as a fundamental right.

II Whether the State court and the United States Court of Appeals decided an important federal law question and/or so far departed from the accepted and ordinary course of judicial proceedings as to call for the exercise of this Court's review and supervisory power.

III Whether Sherman Noble was denied effective assistance of counsel at both the trial level and on appeal, and therefore entitled to post-conviction Rule 37 relief and/or Habeas Corpus relief where he met the "cause" and "prejudice" prong of *Strickland*;

IV Whether it is legal to hold court on a Sunday in derogation of the State and Federal laws of this country.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

TITLE PAGE

Questions Presented for Review.....2

List of Parties 3

Table of Contents.....4-5

Table of Authorities.....6

Jurisdictional Statement (Opinions Below).....7-10

Constitution and Statutory Provisions Involved...11-14

Statement of the Case.....15-18

Concise Argument 19-26

Reasons for Granting the Petition.....27

Conclusion.....28

INDEX TO APPENDICES.....29-30

APPENDIX A - Judgment and Commitment Order

APPENDIX B - Dismissal of Direct Appeal by Arkansas Supreme Court

APPENDIX C - Denial of Rule 37 Post-conviction Relief by trial court

APPENDIX D - Ark. S.Ct. affirms trial court

APPENDIX E - Denial of Petition to Set Aside Plea from trial court

APPENDIX F - Supreme Court of Arkansas affirmed trial court

APPENDIX G - U.S. District Court's denial of Habeas Corpus relief

APPENDIX H - U.S. Court of Appeal affirms on five of six issues. Remands on issue of Ineffective Assistance of Counsel

APPENDIX I - Findings & Recommendation of Magistrate (on remand)

APPENDIX J - U.S. District Court's denial of Habeas Corpus relief

APPENDIX K - U.S. District Court denial of Motion to Set Aside the Recommendations

APPENDIX L - U.S.Court of Appeal (8th Cir.) denies Application for Certificate of Appealability

APPENDIX M - Objection to Recommendation

APPENDIX N - Notice of Appeal
Proof of Service.....66

TABLE OF AUTHORITIES

United States Supreme Court Cases:

Brown v. Allen, 344 U.S. 443 (1953)
McClesky v. Zant, 499 U.S. 467 (1991)
Murray v. Carrier, 477 U.S. 478 (1986)
Strickland v. Washington, 466 U.S. 688 (1984)

Arkansas Court Rules:

Rules 37.4 of the Ark. Rules of Criminal Procedure
Rules 24.3, 4 of the Ark. Rules of Criminal Procedure
Rules 31.1, 4 of the Ark. Rules of Criminal Procedure

United States Constitution:

U.S. Const. Amends. 1, 5, 6, & 14
U.S. Const. Art. 2, Sec. 10, cl. 1 (effective assist)

Arkansas Constitution:

Constitution of Arkansas, Articles 2, §7 & §12

United States Statutes:

28 U.S.C. Section 1254
28 U.S.C. Section 2254
28 U.S.C. Section 1257(a)
28 U.S.C. Section 1651(a)

Arkansas Statutes:

A.C.A. Section 16-112-102, 103(Habeas)
A.C.A. Section 16-10-114

Books and Treaties:

26 A.L.R. 2d 997

JURISDICTIONAL STATEMENT

This is an appeal from a conviction following a conditional guilty plea entered in this matter by Petitioner in the Circuit Court of Jefferson County, Arkansas on Sunday, October 25, 1992.

OPINIONS BELOW

State Courts.

Petitioner, Sherman Noble was sentenced to Life Imprisonment without the possibility of parol, and judgment was entered by the State trial court on or about October 26, 1992. (Appendix A). Mr. Noble's plea of guilty had been "conditional" with the right to appeal his motion to suppress.

Thereafter an appeal was taken to the Arkansas Supreme Court which denied Noble his right to appeal stating that his trial counsel had failed to reduce the "condition" to a writing. The opinion appears herein at Appendix B. (Rehearing denied, Appendix B(1). And see, the published opinion, *Noble v. State*, 314 Ark. 240, 862 S.W. 2d 234 (1993).

Then on November 29, 1993, Noble filed a petition for Rule 37 post-conviction relief (Sixth Amendment right to effective assistance of counsel). From this petition, the Circuit Court of Jefferson County, Arkansas held that Noble's counsel was

indeed ineffective, satisfying the "cause" prong set out in *Strickland v. Washington*, 466 U.S. 688 (1984) but holding that Noble had suffered no "prejudice" (Appendix C, and amended order, Appendix C(1)). The circuit court's decision was affirmed by the Arkansas Supreme Court on March 6, 1995. (Appendix D). In this published opinion reported at *Noble v. State*, 319 Ark. 407 (1995), the Supreme Court decided the previously denied direct- appeal issue of Noble's motion to suppress although at this juncture in his appeal, the issue had not been raised by Noble. Accordingly, Noble also avers the ineffectiveness of his counsel at the appeal level for the failure to raise this very novel issue as well the decision of the Arkansas Supreme Court to entertain the suppression without notice and an opportunity to be heard by Noble.

On February 20, 1996, Noble filed a Motion to Set Aside Plea and/or Writ of Habeas Corpus in the trial court, and upon its denial (Appendix E), a timely notice of appeal was filed in the Arkansas Supreme Court challenging Noble's First and Sixth Amendment rights as well as the void Sunday proceeding, which was affirmed in a now "unpublished" opinion on June 11, 1998. (Appendix F).

United States District Court.

From the Arkansas Supreme Court, a notice of appeal was filed in the United States District Court for

the Eastern District, Eastern Division pursuant to 28 U.S.C. §2254 seeking habeas corpus relief and challenging both procedural default and the applicability of 28 U.S.C. §2254 as amended, of the Antiterrorism and Death Penalty Act, in regards to the timeliness and the "good cause" exceptions; and whether Noble has sufficiently shown that he suffered "prejudice" from the gross and very serious ineffectiveness of his counsel.

The United States District Court, denied relief without a review on the merits by its unpublished order entered November 19, 1999. Appendix G.

Next, on December 15, 1999 pursuant to Rule 3(a) of the Federal Rules of Appellate Procedure, an appeal was filed in the United States Court of Appeals for the Eighth Circuit, the Honorables Bowman, Beam, and Morris Sheppard Arnold, Circuit Judges, presiding. Of the six issues raised before the United States Court of Appeals for the Eighth Circuit, the United States District Court was affirmed on five issues, with one remaining issue remanded to the United States District Court. (Appendix H)

Finally, on February 26, 2002, and April 5, 2002, a Judgement was entered by the United States District Court for the Eastern District of Arkansas, denying and dismissing Sherman Noble's petition for writ of habeas corpus relief.

And on May 14, 2002, Petitioner Sherman Noble's application for appealability was denied by the United States Court of Appeals for the Eighth Circuit.

We now submit for review herein, the issues of whether Sherman Noble was indeed denied the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and its actual applicability to individuals, as well as the illegality of holding court on Sundays in derogation of the First Amendment to the United States Constitution.

The jurisdiction of this Court is now invoked pursuant to 28 U.S.C. Sections 1254(1); 2254(a); 1257(a); and 1651(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT 1 - Religious and political freedom. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievance.

AMENDMENT 6 - Rights of the accused. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Arkansas Code Annotated §16-10-114 (prohibiting Sunday Court Proceedings) provides that:

"(a) No court shall be opened to transact business on Sunday unless it is for the purpose of receiving a verdict or discharging a jury.

(b) Every adjournment of a court on

Saturday shall always be to some other day than Sunday, except such adjournment as may be made after a cause has been committed to a jury.

(c) This section shall not prevent the exercise of the jurisdiction of any magistrate when it may be necessary, in criminal cases, to preserve the peace or arrest the offenders; nor shall this section inhibit the exercise of the jurisdiction of any magistrate on Sunday in disposing of misdemeanor cases where the defendant desires to and does enter a plea of guilty or a plea of nolo contendre."

Section 103(a) of Arkansas Code Annotated §16-112-103 governing the standard for habeas corpus relief provides in pertinent part, that: "The writ of habeas corpus shall be granted . . . to any person who shall apply for the writ by petition showing . . . evidence, [or] probable cause to believe he is detained without lawful authority . . ." *Arkansas Code Annotated §16-112-103(a).*

Rule 37.1 of the Arkansas Rules of Criminal Procedure states in pertinent part that: "a petitioner in custody under sentence of the circuit court claiming a right to be released, or to have a new trial, or to have the original sentence modified on the ground: (a.) that the sentence was imposed in violation of the Constitution and Laws of the United States or this State; or (b) the Court imposing the sentence was without jurisdiction to do so; . . . or (d) that the

sentence is otherwise subject to collateral attack, may file a verified petition in the court which imposed the sentence praying that the sentence be vacated or corrected.

Rule 37.4 of Arkansas Rules of Criminal Procedures provides that: "if the circuit court finds that for any reason the petitioner is entitled to relief, then the Circuit Court may set aside the original judgement, discharge petitioner, re-sentence him/her, grant a new trial, or otherwise correct the sentence as may appear appropriate in the proceedings."

Rule 31.4 of the Arkansas Rules of Criminal Procedures provides in pertinent part that: "no Defendant charged with a capitol felony may waived either a trial by jury on the issue of guilt, or the right to have sentence determined by a jury, unless: (a) the court in which the cause is to be tried determines that the waiver is voluntary and freely proffered without compulsion or coercion; and (b) the prosecuting attorney, with the permission of the court, has waived the death penalty; and (c) the prosecuting attorney has assented to the waiver of trial by jury and such waiver has be approved by the court. *(And also see Ark. Const. Art. 2 Sec. 7 -- Right to Trial by Jury)*

Rule 31.1 of the Arkansas Rules of Criminal Procedure provides that: "No Defendant in any criminal cause may waive a trial by jury unless the

waiver is assented to by the prosecuting attorney and approved by the court."

Rule 24.4 of the Arkansas Rules of Criminal Procedure provides in pertinent part that: "the court shall not accept a plea of guilty . . . from a Defendant without first addressing the defendant personally, informing him of and determining that he understands . . . (b) the mandatory minium sentence, if any, on the charge; . . . and (e) that he if pleads guilty or nolo contendre, he waives his right to a trial by jury and the right to confront the witnesses against him . . ."

Rule 24.3 of the Arkansas Rules of Criminal Procedures states in pertinent part that:

"(a) a plea of guilty . . . shall be received only from the defendant himself in open court . . .

(b) with the approval of the court and the consent of the prosecuting attorney, a Defendant may enter a conditional plea of guilty, . . . reserving in writing, the right to an appeal from the judgement, to review of an adverse determination of a pretrial motion to suppress evidence. If the defendant prevails on appeal he shall be allowed to withdraw his plea . . .

(d) no plea of guilty . . . shall be accepted by any court unless the prosecuting attorney of the governmental unit in which the offense occurred is given opportunity to be heard at the time the plea is tendered."

STATEMENT OF THE CASE

On Sunday, October 25, 1992, Sherman Noble was rushed into a jail-made courtroom, clothed in jail clothes and shackles. Unknowing to Sherman Noble, the Judge had been called over; the bailiff; the prosecutor, and the court reporter. Medal detectors had been installed and activated, and the jail house courtroom was filled to capacity with spectators and the media. Prior to this exact time, Sherman Noble believed that he would be having a "fair" trial, by jury, on the next morning.

Instead, on this Sunday, just prior to the hearing, Sherman Noble had been approached by his trial counsel, Mark Hampton, who told him if he would agree to enter a plea today, right now, that the State would agree to waive the death penalty and not "kill him", if Noble plead guilty this date (Sunday), this minute. Further, Attorney Hampton assured him that if he plead guilty today, the State would agree to allow him to appeal the earlier suppression hearing. Mark Hampton told Mr. Noble that he was "sure" that he would prevail on appeal. It was in this intimidating and coercive environment that Sherman Noble entered a plea. Equally important, eight months had passed since Noble's incarceration, and although he was facing a Capital Murder conviction, his trial attorney Mark Hampton, had only visited with him for a total two (2) hours, prior to this capital trial-- Hence, the initial interview should have lasted longer than two

hours.

Obviously, there had been no trial preparation by Noble's counsel. Thus, on this Sunday, while standing in a jailhouse, made-up court, in the presence of a jail-room filled with strange spectators and the media; standing in jail-clothing, in shackles, with a judge, bailiff, prosecutor and court-reporter– Sherman Noble essentially stood, without counsel– and entered a guilty plea to capital murder. From that proceeding, even the government breached its duty.

The Plea. At this Sunday three-minute hearing, Noble's trial counsel, Mark Hampton made a verbal record that the plea was conditioned upon Noble's right to appeal the suppression hearing. The Court and the State consented by acquiescence only-- eventhough Arkansas law is clear, that the Court and the State was expressly consent.

Then, on direct appeal to the Supreme Court of Arkansas, the Court refused to even entertain Noble's appeal stating that because the "condition" had not been reduced to writing, that Noble was barred from his appeal.

Under the same law, the Court could not receive a guilty plea in a capital case unless the prosecuting attorney consented to the waiver (Rule 24.3 of the Arkansas Rules of Criminal Procedure), and unless a capital defendant waived his right to a

jury trial on the record (Rule 24.4 of the Arkansas Rules of Criminal Procedure).

The Supreme Court turned its head on these deficiencies by the government. And although none of these rights were afforded Noble, the Supreme Court, and all subsequent reviewing courts have refused to address these very important novel deficiencies by the State. In addition to the other issues raised herein, petitioner submits instantly that the duty to insure that the "writing" requirement of Rule 24 was satisfied, as well as the duty to apprise him of his right to a trial by jury and rights that he was giving up this Sunday, was a duty equally shared by the government. Accordingly, he is entitled to habeas relief.

After the Arkansas Supreme Court refused to review Noble's direct appeal, trial counsel Mark Hampton hired a friend attorney to represent Noble on a Rule 37 Post Conviction petition for relief alleging that Noble's trial counsel was ineffective. However, the only issue raised by the Rule 37 counsel was the issue of the requirement to procure a "writing" to reserve an appeal. There, the friend-attorney argued that the transcript should have been considered a "writing"!

No other issue was raised-- not the illegality of the Sunday court proceeding-- and not the illegality of the Court accepting Noble's plea of guilty to a capital

offense absent the consent of the prosecutor; and without fully comprising Noble of the rights he would be giving up by pleading guilty. Hence all three issues were very important issues that should have been raised. Consequently, Noble's appellate counsel was also ineffective. *(Still, to date, Noble has not had the opportunity to be heard on these claims.)*

On the Rule 37 petition, the trial court ruled that under *Strickland v. Washington,* Noble had met the "cause" prong of the test for ineffectiveness, but that he had not met the "prejudice" prong. And although this finding was in plain error, especially when viewed under the circumstances of this case, it was nonetheless, affirmed by the Arkansas Supreme Court.

Unequivocally, Sherman Noble was denied the effective assistance of counsel at both the trial and appellate levels. Hence not only did Mark Hampton fail to procure a writing at the trial level, but at the appellate level, he also neglected to appeal any other issues– specifically, the legality of the Sunday court.

Thus it is at this point that we must seek review and certification of these very fundamental rights which are guaranteed by the First and Sixth Amendments of the United States Constitution– specifically, does one actually have a right to observe the sabbath– and is one actually guaranteed, the right, to effective assistance of counsel.

CONCISE ARGUMENT

INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

Sherman Noble was denied effective assistance of counsel at the entry of his guilty plea, in the sentencing phase, and on appeal by failure of his counsel to observe procedural requisites, in violation of his First, Sixth, and Fourteenth Amendment rights as guaranteed by the United States Constitution, and by Art. 2 Sec. 10 of the Arkansas Constitution. As a result and due to the errors of counsel, the Arkansas Supreme Court dismissed petitioner's appeal on procedural grounds, depriving Mr. Noble the right granted by Rule 24.3(b) to appellate review of his case, and by extension he was also deprived of the right to the substantive relief that favorable consideration of his appellate claim would have brought. Hence, if it had not been for his counsel's errors and ignorance which were so serious in nature, Mr. Noble would not have appeared in court on Sunday, October 25th, and he would not have plead guilty to the charge of capital murder.

By case law, the test for evaluation of whether a defendant received effective assistance of counsel was set out in Strickland v. Washington, 466 U.S. 668 (1984)-- adopted by the Arkansas Supreme Court in Dumond v. State, 294 Ark. 379, 743 S.W.2d 779 (1988); equally, "a defendant is entitled to effective

assistance of counsel on direct appeal". Pennsylvania v. Finley, 481 U.S. 551 (1987).

To begin, it is well followed that the U.S. Supreme Court in the landmark case of Strickland v. Washington, 466 U.S. 668 (1984), set forth a two-pronged test of "cause" (performance) and "prejudice" by which to evaluate a claim of ineffective assistance counsel. Hence, in order to prove ineffective assistance under the *Strickland* analysis, the petitioner must show that counsel's performance was deficient in that counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the U.S. Const. Amend. 6. In addition, the deficient performance must have resulted in prejudice so pronounced as to have deprived the petitioner of a fair trial whose outcome cannot be relied on as just." Orsini v. State, 287 Ark. 456, 701 S.W.2d 114 (1985) *(citing Strickland v. Washington.)*

Second, even if counsel's performance is shown to be insufficient, the judgment must stand unless the petitioner demonstrates that the error had a prejudicial effect on the outcome of the proceeding--hence to prevail on a claim of ineffective assistance of counsel, it is sufficient to demonstrate a reasonable probability that, but for counsel's conduct, the result of the proceeding would have been different. (Strickland v. Washington at 670).

On Sunday, October 25, 1992, Sherman Noble

stood virtually, with no counsel at all. He was brought into court by a man, stating that he was his attorney, who had arranged for a Sunday court. This man had only met with Noble for a total of two hours over an eight-month period. This man, in an effort to have Noble go along with the Sunday court promised and guaranteed Noble that if he went ahead and entered a plea at this moment– on this Sabbath day– that he would appeal the plea and that he would prevail. This man ignorantly neglected to reduce the right to appeal the suppression hearing to a written agreement between the defendant and the State; and this cost Noble any chance he would ever have to an appeal. Moreover, the Court neglected to warn Noble that by entering a plea of guilty, that he also would be forfeiting his right to an appeal. Noble would not have entered a plea otherwise.

Consequently, when this same attorney filed the appeal, the Arkansas Supreme Court dismissed it without a review, holding that the failure to procure a writing, precluded their review. *(Opinion appears in Addendum below. This decision was again affirmed by the trial court on a subsequent Rule 37 and writ of habeas corpus relief petition. Then affirmed by the United States Court District Court, Eastern District of Arkansas, and now affirmed by the United States Court of Appeals for the Eighth Circuit).*

Trial counsel then hired a friend-attorney to file a Rule 37 petition, and while this friend-attorney did file a Rule 37 petition, in the brief, he argued that the

court reporter's transcript should satisfy the writing requirement. Moreover, even the Rule 37 petition failed to raise any other issue. Specifically, the fact that the plea was altogether illegal under Rule 31 of the Arkansas Rules of Criminal Procedure which states that a defendant cannot waive a jury trial unless he is fully apprised of his rights and the rights that he is giving up by pleading guilty-- and Rule 24.4 which mandates that the court cannot accept a plea of guilty unless a defendant has been informed that he is giving up his right to an appeal– and Rule 24.3 which states that a guilty plea cannot be accepted by the Court unless the prosecuting attorney consents and the Court approves-- hence, not one of these legal requisites where adhered to by the Court or by his trial counsel on that Sunday, and not one of these issues were raised in the Rule 37 petition of the friend-attorney. And last, the issue of the illegality of the Sunday court, held against Sherman Noble's religious beliefs, was never addressed.

In denying the one issue raised in the Rule 37 petition by the friend-attorney, the trial court applied the Strickland two-prong "cause and prejudice" test, holding that while Noble had satisfied the "cause" prong, there was no prejudice. It is from this departure and more (and as affirmed by the Federal District and United States Court of Appeal) that we now seek this Court's supervisory power.

To discuss further, instantly, while the trial

court conceded that counsel for Sherman Noble was ineffective at the trial level-- satisfying the "cause" prong of the Strickland case, it erred when it found that the "prejudice" prong had not been met. Thus, it was because of his trial counsel, that Sherman Noble was unable to pursue a direct appeal, no issues were raised, and on his subsequent Rule 37 petition, the friend-attorney failed to raise any real issues that would shadow his hired-buddy's legal reputation– that Noble's trial counsel was incompetent and/or ineffective.

The District Court should have granted relief. Next, we point to the case of Murray v. Carrier, 477 U.S. 478 (1986) where this Court held that "a federal habeas petitioner need only satisfy the district court that the procedural default resulted from his attorney's ignorance or inadvertence, rather than from a deliberate tactical decision. "Ignorance or oversight implies that counsel failed to exercise it at all. Hence, in order to establish cause, a federal habeas petitioner need only satisfy the district court that the failure to object or to appeal his claim was the product of his attorney's ignorance or oversight, not a deliberate tactic. Murray at 484. Hence under Murray, it was decided that "whatever may be the case where counsel has failed to take an appeal at all, counsel's failure to raise a 'particular' claim on appeal is to be scrutinized under the cause and prejudice standard when that failure is treated as a procedural default by the state courts.

In an even earlier case, Brown v. Allen, 344 U.S. 443, 486 (1953), another basis constituting "cause" for habeas relief was set, that being where some interference by officials made compliance impracticable. Importantly, the Court in Brown went on to hold that "similarly, if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not conduct trials at which persons who face incarceration must defend themselves without adequate legal assistance." Brown, *citing Cuyler v. Sullivan, 446 U.S. 335, 344 (1980).* Ineffective assistance of counsel, then, is cause for a procedural default. Cause has also been defined by the Supreme Court as "some objective factor external to the defense that impeded counsel's efforts to raise the claim in state court or in a prior habeas petition. McClesky v. Zant, 499 U.S. 467 (1991). Examples given in McClesky included "government interference".

PREJUDICE

The habeas petitioner must show 'not merely that the errors at trial created a possibility of prejudice but that they worked to his actual and substantial disadvantage, infecting his entire trial with errors of constitutional dimensions. Murray v. Carrier, 477 U.S. 478, 494 (1986). Hence, "such a showing of pervasive actual prejudice can hardly be thought to constitute anything other than a showing that the prisoner was denied 'fundamental fairness' at trial."

Murray at 494.

Instantly, as discussed *supra* the constitutional violations committed against Sherman Noble are blight at the least. It should shock the conscious of this Court and the justice system. A balance of the inequity alone should suffice to satisfy the prejudice requirement. Hence but for his counsel's errors, Sherman Noble would not have plead guilty to capital murder on a Sunday, while in jail clothes and shackles, before the media and numerous unknown spectators.

SUNDAY CONVICTION VIOLATED NOBLE'S FIRST AMENDMENT RIGHT AGAINST HOLDING COURT ON HIS SABBATH DAY

The Sunday conviction was taken on the sabbath, in violation of Arkansas State law and the United States Constitution. Hence, the Sunday plea was taken at a time when the trial court lacked jurisdiction, rendering the conviction void.

To discuss summarily, Arkansas Code Annotated §16-10-114 ("the Sunday statute") prohibits holding court proceedings on a Sunday unless such proceedings fit into a specific exception. Thus, judicial acts other than those specifically authorized by statute cannot lawfully be performed on Sunday, and under the strict scrutiny test, this law must be upheld where it is necessary to achieve a compelling or overriding government purpose (such as

overreaching, first amendment right of religious or sacrilegious affiliation, Sunday considered the sabbath, right to life and liberty, etc). Under even the lowest standard, the Sunday statute must be upheld where it is rationally related to a legitimate interest. Thus, where the conviction rendered by the court is facially invalid; and for violation of his fourth, fifth, sixth, and fourteenth amendment rights as guaranteed by both the United States and the Arkansas Constitutions, and most importantly, where the Sunday plea was taken at a time when the trial court lacked jurisdiction, the same conviction is void. Moreover, where Sherman Noble was not informed of his right to or waiver of a right to appeal *(discussed supra)*, and where petitioner did not waive his right to a jury *(discussed supra)*, and where petitioner was denied effective assistance of counsel *(discussed supra)*, the instant petition and writ should be granted. Equally, the courts below committed reversible error. (And see Chester v. Arkansas State Board of Chiropractic Examiner, 435 S.W.2d 100 (1968), citing 26 A.L.R. 2d 997. (and the progeny of caselaw thereafter), where the Arkansas Supreme Court reiterated that "it has been long established, even from its inception at Common Law that Sunday was considered "dies non juridicus" meaning that any judgment rendered in a judicial or quasi-judicial proceeding is void." As of date, this law has not been repealed nor overruled.

REASONS FOR GRANTING THE PETITION

Sherman Noble submits the following three novel and very important reasons why this Court should grant the instant petition for certiorari:

1. The Supreme Court of Arkansas, the United States District Court for the Eastern District of Arkansas, and subsequently, the United States Courts of Appeal for the Eighth Circuit has parted far from the accepted and usual course of judicial proceedings; and has sanctioned such a departure by the lower courts, so as to call for an exercise of this Court's supervisory power;

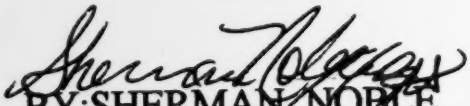
2. The Supreme Court of Arkansas, the United States District Court for the Eastern District of Arkansas, and subsequently, the United States Courts of Appeal for the Eighth Circuit has decided an important federal question in a way that conflicts with prior decisions of this Court; and

3. The Supreme Court of Arkansas, The United States District Court for the Eastern District of Arkansas, and subsequently, the United States Courts of Appeal for the Eighth Circuit has decided an important question of federal law that has not been, but should be settled by this Court.

CONCLUSION

This case presents some of the most novel issues of constitutionality, and issues of overreaching and misapplication of the laws, possibly, in the history of jurisprudence. Hence, at no time during the trial court proceedings has Sherman Noble been afforded effective assistance of counsel, nor has he been afforded any of his constitutional rights as guaranteed by the First, Fifth, Sixth, and Fourteenth Amendments to the Arkansas and United States Constitution. And at no time during the course of appellate proceedings has Sherman Noble been afforded any opportunity to be heard. Therefore, in my very last opportunity to test of our legal system and the guarantee of rights afforded individuals in the United States, it is prayed upon this Honorable Court that the instant petition be granted.

Respectfully submitted,



BY:SHERMAN NOBLE,
PRO SE
Inmate No.: 100015
P.O. Box 240
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DATED this 11th day of October, 2002.

APPENDIX INDEX

APPENDIX A - Judgment and Commitment Order from trial Court

APPENDIX B - Dismissal of Direct Appeal by Arkansas Supreme Court

APPENDIX C - Denial of Rule 37 Post-conviction Relief by trial court

APPENDIX D - Supreme Court of Arkansas affirmed trial court

APPENDIX E - Denial of Petition to Set Aside Plea from trial court

APPENDIX F - Supreme Court of Arkansas affirmed trial court

APPENDIX G - U.S. District Court's denial of Habeas Corpus relief

APPENDIX H - U.S. Court of Appeal affirms on five of six issues. Remands on issue of Ineffective Assistance of Counsel

APPENDIX I - Findings & Recommendation of Magistrate (on remand)

APPENDIX J - U.S. District Court's denial of

Habeas Corpus relief

APPENDIX K - U.S. District Court denial of Petitioner's Motion to Set Aside the Recommendations of the Magistrate; and denial of Certificate of Appealability

APPENDIX L - U.S.Court of Appeal (8th Cir.) denies Application for Certificate of Appealability

APPENDIX M - Petitioner's Objection to the Recommendation of the Magistrate

APPENDIX N - Petitioner's Notice of Appeal and Request for Appealability under 28 U.S.C. 2254 or 2255

APPENDIX A

Judgment and Commitment Order from trial Court

JUDGMENT AND COMMITMENT ORDER

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ARKANSAS, ELEVENTH JUDICIAL DISTRICT, SECOND DIVISION.

STATE OF ARKANSAS V. SHERMAN NOBLE
CASE NO:
PLEA ENTERED: October 25, 1992
DATE OF ENTRY: October 26, 1992

JUDGMENT OF COMMITMENT

On 10/25/1992 the Defendant personally appeared before the Court with legal counsel and having been informed by the Court of the nature of the charge(s), of his constitutional and legal rights, of the effect of a guilty plea upon those rights, and of his right to make a statement before sentencing, the Court made the following findings:(check one applicable)
Defendant voluntarily, intelligently, and knowingly entered a plea of guilty.
DEFENDANT'S FULL NAME: SHERMAN D. NOBLE;
DATE OF BIRTH: 5-4-71; RACE: BLACK; SEX: M
DEFENDANT'S ATTORNEY: Mark F. Hampton;
PROSECUTING ATTORNEY OR DEPUTY: Carol Billings
Defendant was represented by __X__ private counsel

There being no legal cause shown by the Defendant, as requested, why judgment should not be pronounced against him, a judgment of conviction is hereby entered against the Defendant on each charge

enumerated and court costs assessed. The County Sheriff is hereby ordered and directed to transport the defendant to the Arkansas Department of Correction where he is sentenced to hard labor for the term specified on each charge.

STATUTE NO: 5-10-101; OFFENSE: Capitol Murder; OFFENSE DATE: 3-21-92; DOCKET NO: 92-265; COUNTS: I; F/M: F; CLASS: Y; SENTENCE: Life W/O Parole.

TIME TO BE SERVED AT A.D.C: Life without parole.

JAIL TIME CREDIT: 0195 days.

DATE: 10-25-92; CIRCUIT JUDGE: H.A. Taylor

Date filed: 10-26-92

/s/ H.A. Taylor, Circuit Judge

APPENDIX B

Dismissal of Direct Appeal by Ark. Supreme Court

SUPREME COURT OF ARKANSAS

SHERMAN NOBLE, Appellant

V. No: CR-93-427

STATE OF ARKANSAS, Appellee

DATE OF ENTRY: September 27, 1993

Appeal from Jefferson County

Circuit Court (CR92-265-2)

Honorable H.A. Taylor, Circuit Judge

Appeal Dismissed

David Newbern, Associate Justice

Sherman Noble pleaded guilty to capital felony murder and was sentenced to life imprisonment without parole. On appeal, Noble contends the Trial Court should have granted his motion to suppress his in-custody statement made to the police. He argues the statement was involuntary.

The basis of this appeal of a guilty plea conviction is Ark.R.Crim.P. 24.3(b), which states:
(b) With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty or nolo contendre [contendere], reserving in writing the right, on appeal from the judgment, to review of an adverse determination of a pretrial motion to suppress evidence. If the defendant prevails on appeal, he shall be allowed to withdraw his plea.

Nothing before us shows that Mr. Noble conditioned his guilty plea by reserving, in writing, his right to appeal. Nor is there any indication that the Trial Court or the prosecutor consented.

Absent any showing that these requirements were met, we dismiss the appeal.

Appeal dismissed.

APPENDIX C

Denial of Rule 37 Post-conviction Relief by trial court

ORDER DENYING PETITION FOR RELIEF UNDER RULE 37

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ARKANSAS, ELEVENTH JUDICIAL DISTRICT, SECOND DIVISION.

STATE OF ARKANSAS V. SHERMAN NOBLE
CASE NO: CR-92-265-2
DATE OF ENTRY: March 7, 1994

The Court has examined the Rule 37 petition filed by Defendant and the Response thereto filed by the State.

The Court finds that the proper test of ineffectiveness of counsel is the "cause and prejudice" test of Strickland v. Washington. Applying that test to the case at bar, the Court makes the following conclusions:

Defendant has proved "cause." The Court finds that the counsel's failure to observe the procedural requirements to preserve the right to appeal fell below the standard of competence required, whether that is denominated as ineffective assistance of counsel at trial or on appeal.

If "prejudice" is, as Defendant suggests, merely the failure to obtain consideration on the merits, then Defendant would satisfy the prejudice prong. However, the Court disagrees with Defendant's suggested standard of prejudice. The Court finds that the appropriate standard of prejudice is whether there is a reasonable probability that Defendant would have succeeded on the merits of his appeal had it been determined on the merits.

To make that finding would in essence require the Court to reverse its decision on the motion to suppress from which Defendant attempted to appeal. There is no further evidence to present. The Court is unwilling to reverse its findings denying the motion to suppress.

Because of the nature of the findings made herein, the Court finds that there is no need for a hearing. Defendant's request for a hearing is therefore denied as unnecessary.

IT IS SO ORDERED.

/s/ Fred Davis, Circuit Judge
Date: March 7, 1994

APPENDIX D

Supreme Court of Arkansas affirmed trial court

MANDATE- AFFIRMED CRIMINAL
STATE OF ARKANSAS
IN THE ARKANSAS SUPREME COURT
CASE NO: CR94-572
SHERMAN NOBLE, APPELLANT
V. Appeal from Jefferson Circuit (CR92-265-3)
STATE OF ARKANSAS
DATE OF ENTRY: March 6, 1995

In the Supreme Court; Filed: March 6, 1995
BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock,on the 3rd Day, being the first Monday of October, A.D. 1994 amongst others were the following proceedings: On the 13th day of February, A.D. 1995, a day of said term:

This cause came on to be herd upon the transcript of the record of the Circuit Court of Jefferson County, and was argued by counsel; on consideration whereof it is the opinion of the court that there is no error in the proceedings and judgment of said Circuit Court in this cause.

It is therefore considered by the Court that the judgment of said Circuit Court in this cause rendered be, and the same is hereby in all things affirmed and

that unless appellant shall forthwith surrender himself to the Sheriff of Jefferson County in execution of said judgment, his bond be declared as forfeited.

/s/ Jeanette Hence, Clerk

APPENDIX E
Denial of Petition to Set Aside Plea from trial court

IN THE ARKANSAS SUPREME COURT
STATE OF ARKANSAS, RESPONDENT
V. NO: CR-92-265-3
SHERMAN NOBLE, PETITIONER
DATE OF ENTRY: May 21, 1996

ORDER

Now on this day comes on this matter for hearing on the Petition of Sherman Noble to Set Aside Plea, Judgment and Commitment and/or Petition for Writ of Habeas Corpus, and the Plaintiff/Respondent's Response, and from the statements and arguments of counsel and other matters and things before the Court, the Court doth find:

That Defendant/Petitioner, Sherman Noble, entered a plea of guilty to the offense of capital murder on October 25, 1992, a Sunday.

That on November 6, 1992, he filed a Notice of Appeal and Designation of Record.

That on September 27, 1993, his appeal was dismissed by the Arkansas Supreme Court.

That on November 1, 1993, his Petition for Rehearing was denied by the Arkansas Supreme Court.

That on November 29, 1993, he filed a Petition for Relief under Rule 37, A.R.Crim.P., alleging as grounds, ineffective assistance of trial counsel.

That on March 7, 1994, an Order was entered denying relief under Rule 37, and an amended Order was also entered on March 15, 1994.

That on March 15, 1994, a Notice of Appeal and Designation of Record was filed, and once again, the judgment of the trial court was affirmed by the Supreme Court on March 3, 1995.

That on February 20, 1996, Defendant/Petitioner brings this current and latest petition, that being to Set Aside Plea, Judgment and Commitment and/or Petition for Writ of Habeas Corpus. He alleges as grounds that the entry of his plea on October 25, 1992, a Sunday, violated the provision of Arkansas Code Annotated Section 16-10-114, and alleges that such proceedings held on a

Sunday are void. Noble characterizes te Court's acceptance of his plea on a Sunday as being jurisdictional in nature and concludes that since the provisions of Arkansas Code Annotated Section 16-10-114, were violated, that the trial court had no jurisdiction.

Although his February 20, 1996, petition had no brief attached, Defendant/Petitioner did forward such a document to the Court on the eve of the May 3, 1996, hearing. His assertion that the trial court lacked jurisdiction is the central and governing issue of his petition.

That the State has responded and asserts that while the trial court's failure to follow certain statutory procedure might constitute reversible error, it does not deprive the Court of its jurisdiction.

Persuasive to this Court is the apparent conflict with Rule 24 of the Arkansas Rules of Criminal Procedure, as well as Arkansas Code Annotated Sections 16-13-207 and 16-13-210. Arkansas Code Annotated Sections 16-13-207 (Act 49 of 1955, approved February 11, 1955), provides that a circuit court "may be in session at any time the Judge thereof may deem necessary." Arkansas Code Annotated Sections 16-13-210 (Act 91 of 1961, approved February 13, 1961), provides that a Circuit Judge "at any time . . . may hear, adjudicate, or render any appropriate order with respect to, any cause or matter

pending in any circuit court over which he presides." These Acts were enacted after Arkansas Code Annotated Sections 16-10-114 (Act 30 of 1955, approved February 2, 1955). Certainly the apparent conflict between the two statutory enactments is resolved by giving controlling force to the later of the Acts. Likewise, Rule 24 provides no limitation as to the day of the week on which a plea may be taken, and it is well settled to the extent that a statute places any limitation on a court rule, the Court rule would remain supreme (Hickman v. State, 316 Ark. 783 (1994)).

Accordingly, the Court finds that the trial court did not lose jurisdiction on Sunday, October 25, 1992, when it accepted the defendant's plea of guilty.

Further, the Court finds that should this Petition be characterized as one pursuant to Rule 37, it is not timely since there was a prior Rule 37 wherein the issue could or should have been raised and was not. Arkansas Rules of Criminal Procedure 37.2(b) specifically requires the grounds that a sentence was illegal or was illegally imposed to be raised by Rule 37 Petition and should not be the basis for any subsequent petition.

In summary, the instant petition is not well taken, is not timely made, and will be denied in its totality.

IT IS SO ORDERED this 21 day of May, 1996.

/s/ Fred D. Davis, Circuit Judge
(Filed: May 21, 1996)

APPENDIX F
Supreme Court of Arkansas affirmed trial court

SUPREME COURT OF ARKANSAS
SHERMAN NOBLE, Appellant
V.
STATE OF ARKANSAS, Appellee
CASE NO: CR-96-1442
DATE OF ENTRY: June 11, 1998
Appeal from the Circuit Court of Jefferson County (NO. CR92-265-3); Honorable FRED DAVIS, Judge
AFFIRMED
PER CURIAM

In 1992, Sherman Noble pleaded guilty in the Circuit court of Jefferson County to capital felony murder and was sentenced to life imprisonment without parole. He subsequently filed a petition in the circuit court pursuant to Criminal Procedure Rule 37 which was denied. This court affirmed the order. Noble v. State, 314 Ark. 240, 862 S.W.2d 234 (1993).

In 1996, Noble filed in the Circuit court of Jefferson County a second petition for postconviction relief, again seeking to set aside the guilty plea and judgment. Although the petition did not contain any reference to whether Noble was in custody in Jefferson County when he filed the petition, the petition also sought a writ of habeas corpus from the Jefferson County court to effect his release from custody. The court denied relief, and appellant Noble brings this appeal. We find no error and affirm the order.

Appellant argues that he was entitled to relief pursuant to Criminal Procedure Rule 37 because his guilty plea was entered on a Sunday.[1] Appellant, however, had already filed a Rule 37 petition challenging the plea and was not entitled to proceed again under the rule. Rule 37.2(b) provides that all grounds for relief must be raised in the original petition. A petitioner is not entitled to file a second petition pursuant to Rule 37, unless the original petition was specifically denied without prejudice to filing a subsequent petition. Williams v. State, 273 Ark. 315, 615 S.W.2d 628 (1981). When appellant's original petition was denied, it was denied with prejudice; therefore, he could not proceed again under the rule.

Moreover, even if appellant had been entitled to file a second petition, he could not have prevailed. We have held that even when a court is found to have

been created by an unconstitutional act, the judgments of that court are valid and not open to collateral attack on the basis of the court's jurisdiction. Tumbs v. State, 290 Ark. 214, 718 S.W.2d 105 (1986); see also Watson v. State, 291 Ark. 358, 724 S.W.2d 478 (1987). A proceeding under Rule 37 is a collateral attach on a judgment. Chisum v. State, 274 Ark. 332, 625 S.W.2d 448 (1981). As a result, appellant did not state a ground to warrant postconviction relief.

Appellant's remaining arguments can be combined. Appellant contends tat a writ of habeas corpus was warranted because he was in custody by virtue of a judgment entered in a court without jurisdiction. As the appellant's brief does not contain an abstract of the judgment, we cannot say that the judgment reflects a jurisdictional defect. Unless a petitioner can show that the trial court lacked jurisdiction or that the commitment was invalid on its face, there is no basis for a finding that the writ of habeas corpus should issue. Birchett v. State, 303 Ark. 220, 795 S.W.2d 53 (1990).

Affirmed.

APPENDIX G

U.S. District Court's denial of Habeas Corpus relief

IN THE UNITED STATE DISTRICT COURT, EASTERN DISTRICT OF ARKANSAS, PINE

BLUFF DIVISION
SHERMAN NOBLE, PETITIONER
V. CASE NO: H-C-99-98
LARRY NORRIS, Director; Arkansas Department of Corrections
DATE OF ENTRY: November 19, 1999

JUDGMENT

In accordance with the Court's Order entered this date, judgment is hereby entered dismissing this petition for writ of habeas corpus. The relief sought is denied.

IT IS SO ORDERED this 17 day of November, 1999.

/s/ Henry Woods, United States District Judge
(Filed: November 19, 1999)

ORDER

The Court has reviewed the proposed findings and recommendation disposition received from Magistrate Judge H. David Young and the objections filed in response, and has further reviewed the relative record de novo. The Findings and Recommendations are adopted in their entirety as this Court's findings. Judgment shall be entered accordingly.

IT IS SO ORDERED this 19 day of November, 1999.

/s/ Henry Woods, United States
District Judge
(Filed: November 19, 1999)

APPENDIX H
U.S. Court of Appeal affirms on five of six issues

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
NO: 00-1155
SHERMAN NOBLE, Appellant
v.
Larry Norris, Director, Arkansas
Department of Correction, Appellee
Appeal from the United States District Court for the Eastern District of Arkansas
Before BOWMAN, BEAM, and MORRIS SHEPPARD ARNOLD, Circuit Judges.
PER CURIAM.
DATE OF ENTRY: December 15, 1999 (Remanded on one issue)

JUDGMENT

Sherman Noble appeals the District Court's dismissal of his 28 U.S.C. §2254 petition. The District Court concluded tat Noble had procedurally defaulted five of the six claims he presented in his

petition. We agree, and affirm the dismissal of these five claims. See 8th Cir.R. 47B.

The District Court determined that Noble's sixth claim, ineffective assistance of counsel founded in counsel's failure to preserve Noble's right to appeal the denial of a motion to suppress, was not procedurally defaulted. The Court dismissed it; however, concluding that Noble's §2254 petition was untimely.

Subsequently developed case law has rendered the court's conclusion incorrect because Noble had a "properly filed" postconviction petition pending in state court from February 1996 through June 11, 1998. See 28 U.S.C. §2244(d)(2) (Supp. IV 1998) ("properly filed application for State post-conviction or other collateral review" tolls limitations period); Artuz v. Bennett, 121 S. Ct. 361, 363-65 (2000) (defining "properly filed"); Snow v. Ault, 238 F.3d 1033, 1035 (8th Cir.) (Applying 28 U.S.C. §2244(d) definition in concluding that second postconviction motion in state court, subject to dismissal as successive under state law, was nonetheless "properly filed"), cert. denied, 121 S. Ct. 1663 (2001). As such, his June 10, 1999 §2254 petition was timely.

We therefore remand this case to the District Court for consideration of the ineffective-assistance claim on the merits. See Burns v. Gammon, 173 F.3d 1089, 1094 (8th Cir. 1999). The judgment of the

District Court is affirmed in all other respects. Noble's motion to supplement the appellate record with the documents he has tendered is granted.

A true copy.

Attest: Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX I

IN THE UNITED STATE DISTRICT COURT, EASTERN DISTRICT OF ARKANSAS, EASTERN DIVISION
SHERMAN NOBLE, PETITIONER
V. CASE NO: 2-99CV00098 HW
LARRY NORRIS, Director; Arkansas Department of Corrections
DATE OF ENTRY: January 25, 2002

FINDINGS AND RECOMMENDATION

The Eighth Circuit Court of Appeals remanded this case for consideration of the petitioner's claim of ineffective assistance of counsel in this habeas corpus action. This claim was originally dismissed as time-barred, but the subsequent decision of the United States Supreme Court in Artus v. Bennett, 121 S.Ct. 361 (2000), resulted in the Eighth Circuit Court of Appeals ruling that this claim should be considered.

Sherman Noble entered a guilty plea in 1992 in Jefferson County Circuit Court on the charge of capital murder. He was sentenced to life imprisonment. Prior to the entry of the guilty plea, petitioner's attorney filed a motion to suppress his March 21, 1992, statement as involuntarily given. This motion was filed on June 4, 1992. At the close of a hearing on August 18, 1992, the trial court denied the motion to suppress. On October 25, 1992, the petitioner entered his guilty plea. The trial judge noted that the guilty plea was given, in part, because the prosecutor recommended Mr. Noble receive the sentence of life imprisonment. See Exhibit D to docket entry no. 4. At the close of the guilty plea hearing, counsel for the petitioner informed the trial court as follows: Your honor, I do [concur in the plea], and as the Court will be aware, we previously had a suppression hearing on the issue of the voluntariness of the confessions. With the caveat that this plea is taken- and we will reserve the right to appeal the Court's ruling on the suppression- then I will concur with this recommendation. Page 6, Exhibit D to docket entry no. 4.

On November 6, 1992, a notice of appeal was filed, specifically challenging the trial court's denial of the motion to suppress. See Exhibit H to docket entry no. 4. The Arkansas supreme court dismissed this appeal on September 27, 1993 noting that Ark.R.Crim. 24.3(b) requires a conditional plea of guilty to be approved by the trial court, consented to

by the prosecutor, and to be in writing. "Nothing before us shows that Mr. Noble conditioned his guilty plea by reserving, in writing, his right to appeal. Nor is there any indication that the Trial Court or the prosecutor consented." Page 2, Exhibit H to docket entry no. 4. Thus, the appeal was dismissed without a consideration of the merits of the claim.

On November 29, 1993, the petitioner sought postconviction relief pursuant to Ark.R.Crim.P. 37 with the trial court, alleging he received ineffective assistance of counsel when his trial counsel failed to properly enter the conditional guilty plea and failed to preserve the issue of the alleged error regarding the motion to suppress his statements. On March 7, 1994, the trial court denied Rule 37 relief. The trial court specifically found petitioner's trial counsel failed him when he neglected to follow the proper procedure in entering the conditional guilty plea. The court found, however, that no prejudice accrued to petitioner because "the appropriate standard of prejudice is whether there is a reasonable probability that Defendant would have succeeded on the merits of his appeal had it been determined on the merits." Page 1, Exhibit L to docket entry no. 4. Mr. Noble had argued that prejudice occurred from the failure to obtain a ruling on the merits of the claim. On appeal, the Arkansas Supreme Court affirmed the trial court, adopting the trial court's approach and considering "whether there is a reasonable probability that the outcome of the case would have been different but for

counsel's errors." *Noble v. State*, 319 Ark. 407, 416 (1995). The "critical issue" was, then, "whether it is reasonably probable that Noble's direct appeal would have failed, the Arkansas Supreme Court made numerous factual and legal conclusions: "[P]ersistent questioning based upon the interrogator's assumption of the accused's guilt will not render a resulting confession involuntary, particularly whether accused's story is presumed to be untrue on the basis of statements given by other persons present at the time of the crime." 319 Ark. at 418; remarks appealing to Noble's religious convictions "occurred during two different interrogations in which Noble never requested counsel." 319 Ark. at 419; "Appeals to an accused's religious sympathies do not automatically render a confession involuntary." 319 Ark. at 419; It was within the trial court's dominion to resolve the issue over whether an investigator urged Noble to confess all his sins. 319 Ark. at 419; The display of photographs of the victim to Noble "did not exceed the bounds of non-coercive psychological tactics." 319 Ark. at 420; The conflicting testimony of whether Mr. Noble invoked his right to remain silent was for the trial court to determine. 319 Ark. at 420; and "it cannot be said that Noble suffered prejudice or that the trial court committed reversible error in denying postconviction relief." 319 Ark. at 420.

When claims have been adjudicated in state court, the federal habeas corpus statutes provide a framework for our decision. Factual issues

determined in state court are presumed to be correct, and the petitioner has the burden of rebutting this presumption "by clear and convincing evidence." 28 U.S.C.§22254(e)(1). In addition, federal habeas relief on a claim adjudicated in state court is unavailable unless the state court ruling was either (1) contrary to, or involved an unreasonable application of Federal law, or (2) based on an unreasonable determination of the facts in light of the evidence presented in state court. 28 U.S.C. §2254(d)(1) & (2).

Initially, we find that Mr. Noble fails to offer "clear and convincing evidence" to rebut the factual findings rendered in state court. The factual findings contained in the thorough opinion of the Arkansas Supreme Court are, therefore, presumed correct pursuant to 28 U.S.C. §2254(e)(1).

Mr. Noble has two avenues to relief, according to the statute. The first is to show the state court ruling contrary to or an unreasonable application of Federal law. In reviewing this claim, we note that the pertinent Federal case law provides that a petitioner seeking to demonstrate ineffective assistance of counsel must prove that (1) his attorney's actions were unreasonable when viewed in the totality of the circumstances; and (2) he was prejudiced because there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 688 (1983); *Ryder v. Morris*, 752 F.2d 327, 331

(8th Cir. 1985). The petitioner bears a heavy burden in overcoming "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 689; *Kellogg v. Scurr,* 741 F.2d 1099, 1101 (8th Cir. 1984); *Bell v. Lockhart,* 741 F.2d 1105, 1106 (8th Cir. 1984). This presumption is created to "eliminate the distorting effects of hindsight," and recognizes that "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland,* 466 U.S. at 689; *Ryder,* 752 F.2d at 331.

Mr. Noble fails to show the state court rulings in this case were contrary to or an unreasonable application of the Strickland case. Instead, we agree that the state court ruled correctly in finding the petitioner failed to satisfy the second prong of the Strickland case.

The last possible avenue to relief requires Mr. Noble to show the state court adjudication was based on an unreasonable determination of the facts in light of the evidence presented in state court. He fails to make this showing. Our review of the record shows that state court decisions were reasonable in view of the evidence adduced there. The petitioner's disagreement with the state court rulings is in large degree a quarrel over the unfavorable credibility findings. These rulings fell within the province of the

trial court. Since we find the decisions were reasonable, it follows that Mr. Noble is not entitled to relief due to the state court action.

In summary, we recommend that the request for habeas corpus relief be denied due to the failure to demonstrate prejudice stemming from the error committed by the trial attorney. The petition should be dismissed and the relief requested be denied.

IT IS SO ORDERED this 25th day of January, 2002.

-s- H. David Young,
United States Magistrate

APPENDIX J

U.S. District Court's denial of Habeas Corpus relief (on remand)

IN THE UNITED STATE DISTRICT COURT, EASTERN DISTRICT OF ARKANSAS, EASTERN DIVISION
SHERMAN NOBLE, PETITIONER
V. CASE NO: 2-99CV00098 HW
LARRY NORRIS, Director; Arkansas Department of Corrections
DATE OF ENTRY: February 26, 2002

JUDGMENT

In accordance with the Court's Order entered this date, judgment is hereby entered dismissing this petition for writ of habeas corpus. The relief sought is denied.

IT IS SO ORDERED THIS 26TH DAY OF February, 2002.

-s- WMW

APPENDIX K

IN THE UNITED STATE DISTRICT COURT, EASTERN DISTRICT OF ARKANSAS, PINE BLUFF DIVISION

SHERMAN NOBLE, PETITIONER
V. CASE NO: 2-99cv000-98 SWW
LARRY NORRIS, Director; Arkansas Department of Corrections
DATE OF ENTRY: April 4, 2002

ORDER

Petitioner Sherman Noble ("Noble") has filed a motion to set aside the judgment in this case and/or for reconsideration. See Document 29. He thereafter filed an amended motion to set aside the judgment in this case and/or for reconsideration. See Document 31.The Court has carefully reviewed both submissions and is convinced that they have no merit. Both motions are therefore denied.

Noble has also filed a request for a certificate of appealability. See Document 32. 28 U.S.C. 2253(c)(2) provides that a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." Having reviewed the allegations contained in Noble's request, the Court finds that he has not made the requisite showing. His request for a certificate of appealability is therefore denied.

IT IS SO ORDERED this 4th day of April, 2002.

-s- Susan Webber Wright
United States District Judge

APPENDIX L

U.S. Court of Appeal denies Application for Certificate of Appealability

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
NO: 02-1950
SHERMAN NOBLE, Appellant
v.
Larry Norris, Director, Arkansas Department of Correction, Appellee
Appeal from the United States District Court for the Eastern District of Arkansas
Before BOWMAN, LOKEN, and MURPHY, Circuit Judges.
DATE OF ENTRY: May 14, 2002

JUDGMENT

This appeal comes before the Court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

May 14, 2002

-s- Michael Gans

APPENDIX M

IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ARKANSAS, EASTERN DIVISION
SHERMAN NOBLE, Plaintiff
vs. LARRY NORRIS, Defendant
CASE NO: 2-99CV00098-HW
DATE FILED: March 11, 2002

OBJECTION TO RECOMMENDATION

Comes now, the Petitioner, by and through his attorney, THE ANDERSON LAW FIRM, and for his Objection to the Recommendation of the magistrate, and pleads to the Court that it make no decision and/or that the Court reconsider and set aside any

decision in this matter regarding the merits before reviewing the actual petition and brief submitted by Petitioner, with supporting briefs, submitted herein. Notwithstanding, the Petitioner for his Objection to the Recommendation states as follows:

1. The Petitioner is entitled to habeas corpus relief.

2. The petitioner has met his burden as the moving party of showing entitlement to habeas corpus relief. The Respondent, however, has failed to rebut petitioner's claims.

3. The magistrate's decision is based upon an error in the application of the laws; impartiality; and not based upon facts and evidence presented. **Moreover, there has been no agreement by the parties for disposition of this matter by a magistrate.** ***(Emphasis added)***

FACTUAL BASIS FOR OBJECTION

The instant matter is on remand from the Eighth Circuit Court of Appeals for the Eleventh Circuit, directing this Court to review the matter on the merits, that issue being: whether petitioner, Sherman Noble was denied the effective assistance of counsel by his trial counsel, Mark Hampton. Through the appeal

process, the Circuit Court of Jefferson County, Arkansas found that Sherman Noble's trial counsel was indeed "ineffective". Under the *Strickland* analysis however, the Jefferson County Circuit Court found that while Sherman Noble did satisfy the "cause" prong of *Strickland,* he had failed to show any prejudicial effect.

Instantly, on remand, Petitioner stood upon his brief (and will therefore, not recite it again here). The State submitted no new evidence, and in fact, never presented any argument or evidence herein, to rebut petitioner's petition for habeas corpus relief.

It is for all of these reasons, and more, that we submit to the Court again, that the findings and conclusions are in err.

SUPPORTING BRIEF

By case law, the test for evaluation of whether a defendant received effective assistance of counsel was set out in Strickland v. Washington, 466 U.S. 668 (1984)-- adopted by the Arkansas Supreme Court in Dumond v. State, 294 Ark. 379, 743 S.W.2d 779 (1988). Equally, "a defendant is entitled to effective assistance of counsel on direct appeal". Pennsylvania v. Finley, 481 U.S. 551 (1987).

As we have stated, it is well followed that the U.S. Supreme Court in the landmark case of Strickland v. Washington, 466 U.S. 668 (1984), set

forth a two-pronged test of "cause" (performance) and "prejudice" by which to evaluate a claim of ineffective assistance counsel. Hence, in order to prove ineffective assistance under the *Strickland* analysis, the petitioner must show that counsel's performance was deficient in that counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the U.S. Const. Amend. 6. In addition, the deficient performance must have resulted in prejudice so pronounced as to have deprived the petitioner of a fair trial whose outcome cannot be relied on as just." Orsini v. State, 287 Ark. 456, 701 S.W.2d 114 (1985) *citing Strickland v. Washington.*

Second, even if counsel's performance is shown to be insufficient, the judgment must stand unless the petitioner demonstrates that the error had a prejudicial effect on the outcome of the proceeding--a reasonable probability that, but for counsel's conduct, the result of the proceeding would have been different, is sufficient. (Strickland v. Washington at 670).

Instantly, if you will recall, several factors surround this claim for relief. As the prior brief herein sets out, Sherman Noble entered a guilty plea at a three-minute hearing which occurred on Sunday, October 25, 1992, some eight months after his arrest on or about April 11, 1992, and incarceration in the Jefferson County jail. He had only seen his trial counsel for a total period of approximately 2 hours

and 25 minutes prior to the Sunday proceeding. His trial counsel had promised that if Mr. Noble entered a guilty plea, that he would be able to "appeal" a previous motion to suppress. The appeal never occurred. Instead, the appeal was initially dismissed because his trial counsel failed to make a written recordation of the right to appeal. Later, on a Rule 37 petition, and without so much as an opportunity to be heard on the matter, the Arkansas Supreme Court made a ruling on the suppression hearing. Mr. Noble had not presented a brief on the issue because no opportunity to do so had been offered by the Arkansas Supreme Court. Again, there were no attempts made by Sherman Noble's counsel to address or to rectify the error. This too, was effective assistance of counsel.

Lastly, the Court should be reminded that although the trial court denied Sherman Noble's petition for Rule 37 relief outright, the trial court then amended its finding to hold that while Sherman Noble had met the "cause" prong (based upon ineffective assistance of counsel) of the Strickland v. Washington two-pronged "cause" and "prejudice" test, the court found that he had failed to established the "prejudice" prong. The Arkansas Supreme Court, therefore, considered only the "prejudice" prong. Again, we submit instantly, that Sherman Noble did suffer "prejudice" from the acts and inaction of his trial and appellate counsel in that but for the conduct of his counsel, he would not have entered a guilty plea on

Sunday, October 25, 1992; he would have properly reserved his right to appeal; and he would have challenged the refusal of the Arkansas Supreme Court to hear his appeal, and he would have insisted upon his right to be heard when the Arkansas Supreme Court made a ruling on his motion to suppress without so much as a brief from Sherman Noble.

It is for these reasons, that we ask this Court to deviate from the findings of facts and conclusion of law as presented by the magistrate, and follow the law which protects individuals-- specifically, the Sixth Amendment to the United States Constitution.

WHEREFORE, accordingly and for all of the foregoing reasons and facts, Petitioner respectfully objects to the findings and recommendation of Magistrate Young, and prays for a finding of cause and prejudice; that petitioner's motion for habeas corpus relief be granted; for costs, attorney fees and all other just and proper relief.

-s- Gail Anderson,
Attorney for Petitioner

Dated the 18th day of March, 2000.
(cc: The Honorable H. David Young; &
Arkansas Attorney General)

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
EASTERN DIVISION OF ARKANSAS, EASTERN DIVISION

UNITED STATES OF AMERICA,

SHERMAN NOBLE, Petitioner
VS. LARRY NORRIS, RESPONDENT
CASE NO: 2-99CV00098-HW
FILED: March 25, 2002

NOTICE OF APPEAL AND REQUEST FOR CERTIFICATE OF APPEALABILITY FOR PROCEEDING UNDER 28 U.S.C. 2254 OR 2255 FOR ACTION FILED IN THE DISTRICT COURT AFTER APRIL 24, 1996

Notice is hereby given that Sherman Noble, by and through his attorney, Gail Anderson, appeals to the United States Court of Appeals for the Eighth Circuit from a final Order denying Petitioner's Petition for Writ of Habeas Corpus under 28 U.S.C. 28 and U.S.C. Section 2255 entered in this action on November 19, 1999.

The petition challenges the conviction and sentence entered on October 25, 1992. On that date, petitioner was committed to the custody of the Arkansas Department of Corrections to be imprisoned for a term of life without the possibility of parole.

Petitioner respectfully requests that this Court issue a Certificate of Appealability so the petitioner may appeal his claims to the Court of Appeals for the Eighth Circuit. Petitioner has fully set forth the grounds and authority for his claims in the Petitioner for Writ of Habeas Corpus and has made a substantial showing of the denial of a constitutional right. Petitioner wishes to present non-frivolous and substantial questions on appeal, including but not limited to the following:

1. Whether the conviction herein is void by a violation of State law prohibiting court proceedings on Sundays.

2. Whether Sherman Noble's sentence was imposed in violation of the Constitution and laws of the State of Arkansas.

3. Whether Sherman Noble's conviction was obtained by the plea of guilty which was unlawfully induced or not made voluntarily with the understanding of the nature of the charge and the consequences of the plea.

4. Whether Sherman Noble's conviction was obtained by use of coerced confession; and in violation of the privilege against self-incrimination.

5. Whether Sherman Noble was denied of

effective assistance of counsel at both the trial court and appellate levels.

6. Whether Sherman Noble was denial of Right to Appeal, unlawfully and unconstitutionally.

7. Whether Sherman Noble's petitions for post conviction relief and writ of habeas corpus has been timely and properly petitioned in the District Court for relief pursuant to 28 U.S.C.2254 and 2255.

8. Whether the time constraints of 28 U.S.C. Section 2254 (as amended) is applicable to the instant matter.

9. Whether the 28 U.S.C. Section 2244 (as amended)supercedes or overrules longstanding and historical laws regarding the authority and standard of review of the Federal District Court to determine whether habeas corpus relief must be granted for constitutional errors or where there is a deliberate and egregious trial-type errors, irrespective of the time constraints of 28 U.S.C. Section 2244 (as amended).

10. Whether the petitioner can successfully show a miscarriage of justice;

11. Respectfully, whether the District Court

properly considered the Recommendations of the U.S. magistrate in the instant matter.

Respectfully submitted,

-s- Gail Anderson
Attorney for Petitioner